Supreme Court, U.S.
FILED
JAN 28 1992
OFFICE OF THE CLERK

No. 91-1061

In the Supreme Court of the United States

OCTOBER TERM, 1991

RONNIE CURTIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

T. G. HESS
Colonel, USMC

J. RICHARD CHEMA
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Office of the Judge Advocate General of the Navy
Washington, D.C. 20374-1111

QUESTION PRESENTED

Whether the prosecutor exercised a peremptory challenge to excuse a potential court-martial panel member on the basis of his race, in violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Batson v. *Kentucky*, 476 U.S. 79 (1986)	3
Doe v. *United States*, 465 U.S. 605 (1984)	4
Hernandez v. *New York*, 111 S. Ct. 1859 (1991)	4, 5
United States v. *Clemons*, 941 F.2d 321 (5th Cir. 1991)	5-6

Statutes:

Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:

Art. 41, 10 U.S.C. 841	4
Art. 67(b)(1), 10 U.S.C. 867(b)(1)	2
Art. 92, 10 U.S.C. 892	2
Art. 108, 10 U.S.C. 908	2
Art. 118, 10 U.S.C. 918	2
Art. 121, 10 U.S.C. 921	2
Art. 129, 10 U.S.C. 929	2
Art. 130, 10 U.S.C. 930	2
Art. 134, 10 U.S.C. 934	2

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1061

RONNIE CURTIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1b-20b, is reported at 33 M.J. 101. An earlier opinion of the Court of Military Appeals, Pet. App. 1a-39a, is reported at 32 M.J. 252. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 1c-84c, is reported at 28 M.J. 1074.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 10, 1991. A petition for rehearing was denied on September 30, 1991. The petition for a writ of certiorari was filed on December 30, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Camp Lejeune, North Carolina, petitioner, a member of the United States Marine Corps, was convicted of two premeditated murders, larceny, burglary, unlawful entry, indecent assault, damage to government property, and disobeying a general order, in violation of Articles 118, 121, 129, 130, 134, 108, and 92 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918, 921, 929, 930, 934, 908, and 892. He was sentenced to death. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review, sitting en banc, affirmed. Pet. App. 1c-43c. The Judge Advocate General of the Navy thereafter filed the record with the Court of Military Appeals for its mandatory review pursuant to Art. 67(b)(1), UCMJ, 10 U.S.C. 867(b)(1). After some preliminary proceedings, the Court of Military Appeals upheld petitioner's convictions, but remanded the case to the court of military review for further proceedings on his sentence. Pet. App. 1b-20b.

1. Petitioner was an administrative clerk at Camp Lejeune. First Lieutenant James Lotz was petitioner's superior officer. Apparently due to his belief that Lotz was racially prejudiced, petitioner decided to kill him. Late one evening, petitioner broke into the supply building and stole a K-Bar combat knife. Petitioner gained entry to the Lotzes' home through the ruse that a member of the supply section had been involved in a car accident and needed emergency help. While Lotz was calling for assistance, petitioner fatally stabbed Lotz in the chest and back. Lotz called to his wife before he died. When Mrs. Lotz entered the room, petitioner stabbed her seven times in the head, neck, and back. As Mrs. Lotz lay on the floor

dying, petitioner ripped and cut off her panties and fondled her vaginal area. Petitioner ultimately made his getaway in one of the Lotzes' cars. In so doing, petitioner crashed into a ditch. Petitioner thereafter confessed his crimes to the state police during their investigation of the accident. Pet. App. 1a-2a, 2c-5c.

2. At the close of his voir dire of Sergeant Edwards, a prospective court-martial panel member, the prosecutor asked the sergeant whether he had any general feelings about this case. Sergeant Edwards replied that "it would be to me a learning experience." Pet. App. 5b. The prosecutor later challenged Sergeant Edwards peremptorily, and the defense objected. After the prosecutor explained that he struck the sergeant because of that remark, the trial judge said that he, too, had noted that response. *Id.* at 7b. After finding no evidence that the prosecutor had challenged any potential court-martial panel members because of their race, the judge held that the prosecutor's explanation for striking Sergeant Edwards was sufficient under *Batson*. *Id.* at 7b-8b. On appeal, the court of military review, *id.* at 30c-37c, and the Court of Military Appeals, *id.* at 2b-10b, rejected petitioner's claim that Sergeant Edwards was improperly struck under *Batson*, holding that the prosecutor's explanation was race-neutral.

ARGUMENT

Petitioner claims that the military prosecutor exercised his one peremptory challenge to excuse a potential court-martial panel member on the basis of his race. That fact-bound claim does not warrant review by this Court.

1. In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), this Court held that a prosecutor may not use a peremptory challenge to excuse from the venire a mem-

ber of a cognizable racial group on the basis of that person's race. *Id.* at 89. If the defendant makes a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror or jurors in question. The trial judge must then determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.* at 96-98; *Hernandez* v. *New York*, 111 S. Ct. 1859, 1866 (1991) (plurality opinion).[1] The trial judge's finding on the question of discriminatory intent is a finding of fact that is subject to review only under the clearly erroneous standard. *Id.* at 1868-1869 (plurality opinion).

In this case, both military appellate courts upheld the trial court's determination that the prosecutor did not violate *Batson* by exercising his peremptory challenge to excuse Sergeant Edwards. The concurrent findings by both military appellate courts do not warrant review by this Court. See, *e.g.*, *Doe* v. *United States*, 465 U.S. 605, 613-614 (1984). In any event, the courts below are correct. A "neutral explanation" is one that is "based on something other than the race of the juror. * * * Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez*, 111 S. Ct. at 1866 (plurality opinion). The prosecutor's

---

[1] In the military justice system, the prosecutor has only one peremptory challenge. Art. 41, UCMJ, 10 U.S.C. 841. It is unnecessary in this case to decide how in such a system a defendant can establish a prima facie case of discrimination under *Batson*, since the prosecutor gave a race-neutral reason for challenging Sergeant Edwards. Under those circumstances, the preliminary question whether petitioner established a prima facie case of discrimination is moot. *Hernandez*, 111 S. Ct. at 1866 (plurality opinion).

explanation in this case satisfies that standard. Although a prosecutor would not be able to challenge for cause a juror who expressed an interest in serving as a juror because of the learning experience that it might bring, a prosecutor could reasonably believe that a juror in a capital case should focus his attention on the heavy responsibility that accompanies jury duty in such a case. The question whether a defendant charged with a capital crime is guilty or innocent —to say nothing of the question whether he should be sentenced to death—is of overwhelming importance to the parties as well as to the community and the survivors, and it should be answered with a firm appreciation of the seriousness of the proceedings. The prosecutor's concern about the sergeant's remark was therefore understandable and did not suggest any intent to discriminate on the basis of race.

2. Petitioner asks this Court to grant review to decide whether a prosecutor's reason for exercising a peremptory challenge must be, in petitioner's words, "relate[d] to the * * * case" Pet. 12. That claim lacks merit. *Batson* requires only that a prosecutor give a race-neutral reason for excusing a potential juror, even if the reason would apply in every case and would have no bearing on the issues to be tried in the particular case at hand. For example, a prosecutor could excuse every venireman who had previously served as a lawyer in the public defender's office without running afoul of *Batson*. The defense would then have the burden of proving that that reason is just a pretext for purposeful discrimination. Petitioner had that opportunity in this case, but failed to make that showing.[2]

---

[2] Petitioner contends, Pet. 16, that the decision below conflicts with the Fifth Circuit's decision in *United States* v.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

T. G. HESS
Colonel, USMC

J. RICHARD CHEMA
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Office of the Judge Advocate
General of the Navy

JANUARY 1992

Clemons, 941 F.2d 321 (1991), but that claim is mistaken. *Clemons* upheld a prosecutor's decision to strike a venireman who, in the district court's words, "looks like a rock star." *Id.* at 323. That case does not conflict with this one.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45280